

Zacharias (Migration) [2020] AATA 5588 (19 November 2020)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Stavros Zacharias
CASE NUMBER:	1724681
DIBP REFERENCE(S):	CLF2014/28957
MEMBER:	Stephen Conwell
DATE:	19 November 2020
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa: • cl.801.226 of Schedule 2 to the Migration Regulations

Statement made on 19 November 2020 at 1:45pm

CATCHWORDS

MIGRATION – Partner (Resident) (Class BS) visa – Subclass 801 (Partner) – false or misleading information – relationship ceased before interview with the Department – genuine and continuing relationship – inadvertent use of the incorrect date – purposeful fraud – identity details satisfied – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5(1), 65
Migration Regulations 1994, Schedule 2, cl 801.226

CASES

Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 28 September 2017 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act* 1958 (the Act).
2. The applicant applied for the visa on 24 February 2014 on the basis of his relationship with his sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.801.226 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate found the applicant did not meet public interest criterion (PIC) 4020.
4. The hearing was held during the coronavirus (COVID-19) pandemic. Having regard to the nature of the review, and the objectives of the Tribunal to provide a mechanism of review that is just, fair, economical and quick, the Tribunal determined that it was appropriate that this review be conducted by way of video conference. The Tribunal exercised its discretion to hold the hearing by video conference. The applicant raised no objections as to conducting the hearing by video conference.
5. The applicant provided a copy of the delegate's decision to the Tribunal for the purpose of the review.
6. The applicant appeared before the Tribunal on 19 November 2020 to give evidence and present arguments. The applicant was represented in relation to the review by his lawyer and registered migration agent who attended the video hearing (representative).
7. For the following reasons, the Tribunal has concluded that the decision should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The law

9. The issue in this review is whether the applicant meets PIC 4020 as required by cl.801.226 for the grant of the visa. Broadly speaking this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy cl.4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: cl.4020(2A); and

- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2B) and (2BA).

10. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B).

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

11. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act. In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
12. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
13. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
14. According to the decision record, the applicant participated in a telephone interview with a Departmental officer on 27 February 2017. During that interview he stated that he was still in a relationship with his sponsor, Ms Michelle Zanele Mavuso. However some months later he submitted a Form 1410, dated 25 July 2017, in which he stated that their relationship had ended on 5 February 2017, a few weeks before his telephone interview with the Department.
15. The delegate came to an initial conclusion that the applicant had provided false and misleading information to the Department regarding his relationship with his sponsor, namely that it was continuing at the time of his telephone interview with the Department.
16. On 28 August 2017 the Department wrote to the applicant granting him 28 days in which to comment on the suspected 'non-genuine' information provided to the Department. At the time of the delegate's decision no response had been received by the Department. The delegate proceeded to find that the applicant has given or caused to be information that is false or misleading in a material particular, namely that his relationship with his sponsor was genuine and continuing at the time of his telephone interview on 27 February 2017.
17. Consequently the delegate concluded that the applicant did not satisfy Public Interest Criterion (PIC) 4020, in particular subclause 4020(1). Furthermore there was no evidence or information to suggest that the applicant was seeking a waiver of PIC 4020.
18. The representative's written submission of 2 September 2020 to the Tribunal states that when completing the Form 1410,
 19. "The applicant had mistakenly noted down 5 February 2017 when he meant to state 5 April 2017 It is the review applicant's sincere view that he made an honest mistake when completing the Form 1410, and overlooked to correct the date that the relationship between him and the sponsor officially ended and became irreparable."

20. The applicant's claim is that he simply got the dates 'mixed up' when completing the Form 1410, incorrectly putting down 5 February 2017 instead of 5 April 2017.
21. The applicant's ex-wife (his sponsor) has provided a statutory declaration dated 1 September 2020 which states that she and the applicant "were married and lived together from 2014 until April 2017. Which is when our marriage ended." Also submitted to the Tribunal was a Tenant Ledger Report indicating that the applicant and the sponsor ended cohabitation of their rental home as of 5 April 2017.
22. There is a discrepancy between the claim that the marriage ended in April 2017 and the representative's written submission which states that at the time of his telephone interview on 27 February 2017 the applicant and his sponsor remained in a relationship, "albeit it being an unstable one, the two had yet to officially sever all ties with one another until a month later." This statement suggests that whilst the relationship was alive at the time of the telephone interview with the Department, it ended a month later in late March 2017, not in April 2017. At hearing the representative conceded that this statement is imprecise and inconsistent with the applicant's statement that the relationship ended in April 2017.
23. Notwithstanding this discrepancy of timing between the representative's written submission and the other written evidence, there appears to be unanimity in the evidence that on 27 February 2017 when he participated in a telephone interview with the Department the applicant was still in a relationship with his sponsor.
24. The applicant claims that he did not intend to provide 'non-genuine' information in his Form 1410 and the incorrect date given for the end of the relationship with his sponsor was simply an innocent or unintended matter lacking the necessary element of purposiveness or fraud to attract the operation of PIC 4020.
25. After considering all the evidence and having had the benefit of hearing the applicant's oral testimony and assessing his credibility, the Tribunal is prepared to accept the applicant's submission that he did not intentionally provide 'non-genuine' information in his Form 1410 but instead had inadvertently inserted the incorrect date for the end of the relationship with his sponsor.
26. The Tribunal's therefore accepts the submission that the bogus document was an innocent or unintended matter lacking the necessary element of purposiveness or fraud to attract the operation of PIC 4020.
27. Therefore, the Tribunal is satisfied that the applicant does meet PIC 4020(1).

Has a visa previously been refused on the basis of a failure to satisfy cl.4020(1)?

28. Clause 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy cl.4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused.
29. There is no evidence before the Tribunal that the applicant or any member of his family unit have been refused a visa because of a failure to satisfy cl.4020(1).
30. Therefore, PIC 4020(2) is met.

Has the applicant satisfied the identity requirements?

31. Clause 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. The applicant's identity documents had been provided with the application. No issue with his identity has been raised by the delegate. The Tribunal is satisfied that the applicant meets cl.4020 (2A).

Has a visa previously been refused on the basis of a failure to satisfy cl.4020(2A)?

32. Clause 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: cl.4020(2BA).
33. There is no evidence that the applicant or any member of his family unit had been refused a visa because of failure to satisfy the identity requirement.
34. Therefore PIC 4020(2B) is met.

35. Conclusion

36. On the basis of the above, the applicant does satisfy PIC 4020 for the purposes of cl.801.226.

DECISION

37. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:
 - cl.801.226 of Schedule 2 to the Regulations

Stephen Conwell
Member